

**Kerajaan Negeri Terengganu v
Petroliam Nasional Bhd & Anor**

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HIGH COURT (KUALA LUMPUR) — CIVIL OF COURT NO S3-21-99 OF
2001

ARIFIN ZAKARIA J

29 AUGUST 2002

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Civil Procedure — Preliminary issue — Application for issues or questions raised in pleadings to be tried on preliminary basis — Whether the issues or questions could be appropriately dealt with under O 14A and/or O 33 of the RHC — Rules of the High Court O 14A & O 33

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On 22 July 1975, the Government of the State of Terengganu ('the plaintiff'), by the then Menteri Besar, signed a vesting instrument, vesting on the first defendant the ownership, rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum. On the same date an agreement was entered into by both parties whereby it was agreed that in consideration of the vesting instrument, the first defendant shall make payments in the form of a yearly sum amounting to the equivalent of 5% of the value of petroleum won and saved in the State of Terengganu and sold by the first defendant, its agent or contractors. Accordingly payments were made until March 2000 when the first defendant ceased to make such payment. The plaintiff brought this action against both the defendants based on several causes of action as set out in its statement of claim wherein the plaintiff sought several reliefs. After the close of the pleadings, the first and second defendants filed summons in chambers ('SIC') in encll (4) and (6) respectively seeking leave of the court for the determination of several preliminary issues of law under O 14A and/or O 33 of the Rules of the High Court 1980 ('the RHC'). The defendants contended that the determination of those issues, one way or the other, would be decisive of the matter before the court. The plaintiff strenuously resisted the defendants' application in encll (4) and (6). The question before the court was whether the issues of both facts and law arising in the instant case could be appropriately dealt with under O 14A and/or O 33 r 2 of the RHC.

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Held, dismissing the defendants' application with costs:

- (1) The plaintiff should be given the opportunity to call witnesses to give evidence on the factual background leading to the execution of the two agreements. This was highly relevant to the interpretation and construction of the two agreements. Whether such evidence would support the plaintiff's case was a matter which should be left to the trial judge to decide after having heard the witness or witnesses concerned (see p 270A-B).
- (2) Order 14A and O 33 procedures should only be used in clear and simple cases. Having considered the pleadings and submissions of

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- A the parties, the court decided that the case was far from being plain and simple. It raised a number of complex legal issues involving, among other, the interpretation and construction of the Federal and State Constitutions, international conventions, the Petroleum Development Act 1974 and a number of other statutes.
- B Further, the parties had failed to come to an agreement on the facts relevant to the issues before the court (see pp 271B–C, 272D–E).

[Bahasa Malaysia summary]

- C Pada 22 Julai 1975, Kerajaan Negeri Terengganu ('plaintif'), menerusi Menteri Besarnya ketika itu, telah menandatangani satu instrumen meletakkan ke atas defendan pertama pemunyaan, hak, kuasa, kebebasan dan keistimewaan mencari, menggali dan mengambil petroleum. Pada tarikh yang sama satu perjanjian telah dimasuki oleh kedua-dua pihak yang mana telah dipersetujui bahawa
- D sebagai balasan instrumen meletakkan tersebut, defendan pertama akan membuat bayaran dalam bentuk jumlah tahunan yang bersamaan dengan 5% nilai petroleum yang telah diambil dari Negeri Terengganu dan dijual oleh defendan pertama, ejen dan kontraktornya. Bayaran-bayaran tersebut telah dibuat sehinggalah bulan Mac 2000 bila mana defendan pertama berhenti membuat pembayaran tersebut. Plaintiff mengambil tindakan ini terhadap
- E kedua-dua defendan berlandaskan beberapa kausa tindakan yang dinyatakan di dalam pernyataan tuntutan yang mana plaintiff telah memohon beberapa relif. Setelah penutupan pliding, defendan pertama dan kedua telah memfailkan saman dalam kamar lampiran
- F (4) dan (6) masing-masing memohon kebenaran mahkamah bagi memutuskan beberapa isu permulaan yang berkaitan dengan undang-undang di bawah A 14A dan/atau A 33 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Defendan-defendan menyatakan bahawa keputusan ke atas isu-isu tersebut akan dapat menentukan perkara yang dihadapi di hadapan mahkamah. Plaintiff membantah permohonan defendan di dalam lampiran (4) dan (6). Persoalan di hadapan mahkamah adalah sama ada isu-isu yang berkaitan dengan fakta dan undang-undang di dalam kes semasa dapat ditentukan dengan sewajarnya di bawah A 14A dan/atau A 33 k 2 KMT.
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H **Diputuskan**, menolak permohonan defendan-defendan dengan kos:

- I (1) Plaintiff seharusnya diberi peluang untuk memanggil saksi-saksi bagi memberi keterangan berkenaan dengan fakta-fakta yang membawa kepada penyempurnaan kedua-dua perjanjian tersebut. Ini adalah sangat relevan untuk terjemahan dan pentafsiran kedua-dua perjanjian tersebut. Sama ada keterangan sedemikian akan menyokong kes plaintiff adalah perkara yang patut ditentukan oleh hakim perbicaraan setelah beliau mendengar saksi-saksi yang dikatakan (lihat ms 270A–B).

- (2) Prosedur-prosedur di dalam A 14A dan A 33 hanya boleh digunakan di dalam kes-kes yang jelas dan mudah. Setelah menimbangkan pliding-pliding dan hujah-hujah kedua-dua pihak, mahkamah memutuskan bahawa kes ini bukanlah kes yang jelas dan mudah. Ia telah menimbulkan beberapa isu undang-undang yang kompleks yang melibatkan, antara lainnya, pentafsiran Perlembagaan Persekutuan dan Negeri, konvensyen antarabangsa, Akta Kemajuan Petroleum 1974 dan beberapa lagi undang-undang. Tambahan lagi, kedua-dua pihak telah gagal untuk mencapai persetujuan ke atas fakta-fakta yang relevan bagi isu-isu yang dihadapi ke mahkamah (lihat 271B–C, 272D–E).]

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Notes

For cases on preliminary issues, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) para 4903.

Cases referred to

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241 (refd)

Allen v Gulf Oil Ltd [1981] AC 1001 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Korso Finance Establishment Anstalt v John Wedge unrep, 15 February 1994 CA Transcript No 14/387 (refd)

MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 5) [1998] 3 MLJ 226 (refd)

Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474 (refd)

Palaniappa Chettiar v Sithambaram Chettiar & Ors [1982] 1 MLJ 186 (refd)

Prenn v Simmonds [1971] 3 All ER 237 (refd)

SI Rajah & Anor v Dato' Mak Hon Kam & Ors (No 1) [1993] 3 MLJ 741 (refd)

Tilling v Whiteman [1982] AC 1 (refd)

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Legislation referred to

Companies Act 1965

Evidence Act 1950

Petroleum Development Act 1974 s 2

Rules of the Supreme Court [Eng] O 14

Rules of the High Court 1980 O 14A r 1(2), O 33 r (2)

Supreme Court Practice 1999 Vol 1 para 14A/2/5

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Tommy Thomas (*Sitpah Silvaratnam* and *Megat S Merican* with him) (*Tommy Thomas*) for the plaintiff.

Cecil Abraham (*RS Nathan* and *Rishwant Singh* with him) (*Shearn Delamore & Co*) for the first defendant.

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A *Dato' Azahar bin Mohamed (Dato' Mary Lim and Azizah bte Nawawi with him)* (Attorney General's Chambers) for the second defendant.

Arifin Zakaria J: The plaintiff is the Government of the State of Terengganu, one of the component states of the Federation of Malaysia. The first defendant is a body corporate incorporated under the Companies Act 1965 and conferred with the rights, powers, privileges and liberties set out in the Petroleum Development Act 1974 ('PDA'). The second defendant is the Government of Malaysia. The PDA came into force on 1 October 1974, s 2 which provides:

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- (1) The entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia shall be vested in a Corporation to be incorporated under the Companies Act, 1965, or under the law relating to incorporation of companies.
 - (2) The vesting of the ownership, rights, powers, liberties, and privileges referred to in sub-s (1) shall take effect on the execution of an instrument in the form contained in the Schedule to this Act.
 - (3) The ownership and the exclusive rights, powers, liberties and privileges so vested shall be irrevocable and shall enure for the benefit of the Corporation and its successor.

E On the 22 July 1975, the vesting instrument was signed by the then Menteri Besar of the plaintiff, vesting on the first defendant the ownership, rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum. On the same date, an agreement was entered into between the plaintiff and the first defendant whereby it was agreed that in consideration of the vesting instrument granted by the plaintiff to the first defendant, the first defendant shall make cash payments in the form of a

F yearly sum amounting to the equivalent of 5% of the value of petroleum won and saved in the State of Terengganu and sold by the first defendant, its agents or contractors. Accordingly, payments were made by the first defendant to the plaintiff from the year 1978 until March 2000, when the first defendant ceased to make such payment.

G The plaintiff brought this action against both the first and second defendants based on several causes of action as set out in the statement of claim wherein the plaintiff seeks the following reliefs, namely:

- (A) As against the first defendant:
- H**
- (i) specific performance of the principal and supplementary agreements;
 - (ii) an order that the first defendant pays within 14 days of an order of this court to the plaintiff the cash payments due and payable on 1 September 2000 and at future dates in accordance with the terms of the principal and supplementary agreements;
 - (iii) damages for breach of contract; and
 - (iv) general damages.
- I**
- (B) As against the second defendant:
- (i) general damages;

- (ii) aggravated damages; and
- (iii) exemplary damages.

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(C) As against both defendants:

- (i) interest on all sums ordered to be paid at such rate and for such period as the courts deems fit;
- (ii) costs; and
- (iii) further or other reliefs.

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After the close of pleadings, the first and second defendants respectively filed the summons in chambers ('SIC') (encll (4) and (6) respectively) seeking leave of this court for the determination of several preliminary issues of the law under O 14A and/or O 33 of the Rules of the High Court 1980 ('the RHC').

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The proposed questions or issues of law as formulated by the first defendant are found in Appendix I to their SIC which for ease of reference are reproduced below:

PROPOSED QUESTIONS OR ISSUES OF LAW

- 1 Did the plaintiff have any rights over petroleum won and saved in the 'continental shelf' (as defined in the Continental Shelf Act 1966 ('CSA') (hereinafter 'Continental Shelf') off the plaintiff's coast up and just prior to:
 - (i) the enactment of the Petroleum Development Act 1974 ('PDA')?
 - (ii) the execution of the Agreement dated 22 March 1975 between the plaintiff and the first defendant?
- 2 Did the plaintiff vest any rights to petroleum won and saved in the Continental Shelf off the plaintiff's coast in the first defendant vide:
 - (i) the 'Vesting instrument'?
 - (ii) the Agreement dated 22 March 1975 between the plaintiff and the first defendant?
- 3 Is the plaintiff entitled to payment under s 4 of the PDA in respect of petroleum won and saved in the Continental Shelf off the plaintiff's coast?
- 4 Does the doctrine of estoppel apply to Petronas?
- 5 Has the plaintiff any legitimate expectation of continuing to receive payment from the first defendant in respect of petroleum won and saved in the Continental Shelf off the plaintiff's coast?

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The proposed questions or issues of law as formulated by the second defendant are found in Appendix A to their SIC which are reproduced below:

PROPOSED QUESTIONS OR ISSUES OF LAW

- 1 Did the plaintiff have any rights under the law over petroleum won and saved in the 'continental shelf' (as defined under the Continental Shelf Act 1966) adjacent to the plaintiff's coast up and just prior to —
 - (i) the enactment of the Petroleum Development Act 1974?
 - (ii) the execution of the Agreement dated 22 March 1975 between the plaintiff and the first defendant?
- 2 If the answer to the first question is in the negative, can the plaintiff nevertheless validly vest any rights under the law in respect of petroleum won and saved in the 'continental shelf' (as defined under the

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- A** Continental Shelf Act 1966) so as to enable the plaintiff to receive payment in respect of the same, vide —
- (i) the ‘Vesting Instrument’?
 - (ii) the Agreement dated 22 March 1975 between the plaintiff and the first defendant?
- B** 3 On a true and proper construction of the intent and purpose of s 4 of the Petroleum Development Act 1974, is payment due to the plaintiff in respect of petroleum won and saved in the ‘continental shelf’ (as defined under the Continental Shelf Act 1966) pursuant to the ‘Vesting Instrument’ and the Agreement dated 22 March 1975 entered into between the plaintiff and the first defendant.
- C** Mr Cecil Abraham, the learned counsel for the first defendant contends that the disputes in this suit principally revolve around the interpretation of the provisions of the Federal Constitution, the State Constitution of Terengganu, the agreements, statutes and conventions referred to in the pleadings. He then submits that the court is perfectly able to elucidate the provisions of the constitutions, agreements, statutes and conventions without the aid of extrinsic or oral evidence. It is the defendants’ contention that these questions or issues if determined one way or the other will be decisive of the matter before the court. The learned counsel for the second defendant, Dato’ Azahar bin Mohamed in large measure adopts the submission of Mr Cecil Abraham and adds that the proposed statement of
- D** agreed facts which he contends, are based on undisputed facts derived from the plaintiff’s own pleadings, are sufficient to assist the court to determine the core issues, that is, whether the plaintiff has any rights to petroleum in the continental shelf off the coast of Terengganu between the years 1911–1975.
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- F** The plaintiff strenuously resists these applications on the grounds appearing in the affidavit of Tun Dato’ Dr Haji Mohd Salleh bin Abas affirmed on 24 December 2001. These are found in paras 7–15 of his affidavit which, for ease of reference, are reproduced below:
- G** 7 First the pleadings. The statement of claim contains 87 paras and in 28pp. The defence filed on behalf of Petronas is in 52 paras and 29pp. The defence filed on behalf of the second defendant (‘the Federal Government’) is in 65 paras and runs to 33pp. Our reply to each defence is equally lengthy and extensive. The pleadings total 113 pp.
- H** 8 Secondly, the causes of action relied upon by the Terengganu State Government in its statement of claim are exhaustive in nature. As against Petronas are raised causes of action in private law founded in breach of contract, estoppel and breaches of statutory duty. Public law causes of action include breaches of arts 8 and 13 of the Federal Constitution and breaches of administrative law for acting ultra vires the Petroleum Development Act 1974.
- I** 9 As against the Federal Government, the Terengganu State Government relies upon causes of action based on the tort of inducing breach of contract and upon public law for damages for violations of the Federal Constitution and Petroleum Development Act 1974, including aggravated and or exemplary damages.

- 10 Thirdly, numerous issues of complexity are raised in the pleadings. Thus, each cause of the action it self raises multiple issues of fact and law. A
- 11 Fourthly, myriad question of law fall for determination. They include novel and difficult legal questions, some of which have never been considered b any court. Such questions cannot be answered in isolation or in a vacuum; they can only be properly determined after evidence, both documentary and viva voce, are adduced and facts emerge at trial. Hence, it is vital for the factual matrix to evolve and develop before an attempt is made to determine legal questions. B
- 12 Fifthly, discovery of documents is fundamental to this case. A review of the pleadings will indicate and that this suit involves massive documentation, including historical sources pertaining to the rights and privileges of the Terengganu State Government and issues of sovereignty. Justice cannot be achieved in dealing with the documents by the short-cut method proposed by the defendants. C
- 13 Sixthly, having regard to the pleaded issues, it is vital that witnesses testify in the normal way in a trial and be subject to cross-examination so that this honorable court is put in a position to make findings of fact which would then assist the court to reach conclusions on the respective cases of the three parties. D
- 14 Finally, having regard to the complex issues of fact and law, and the scale and magnitude of the cash payments, one can reasonably expect this case to go on appeal, first to the Court of Appeal and thereafter, if leave is secured, to the Federal Court. The appellate courts would be in a much better position to hear the appeals after a trial rather than a summary disposal as envisaged by the defendants. E
- 15 This is a heavy commercial/constitutional case of public and national interest. It cannot be disposed off in a summary way.’

Order 14A of the RHC

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It is pertinent to consider the scope and efficacy of O 14A. This order was first introduced into our RHC by PU(A) 342/2000. The objective of the order is to expedite the final disposal of an action at interlocutory stage with the view of saving costs and time. This order was adopted from O 14A of the English Rules of the Supreme Court with some modification. Our O 14A of the RHC reads as follows:

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- 1 Determination of questions of law and construction (O 14 r 1):
 - (1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that —
 - (a) such question is suitable for determination without the full trial of the action; and
 - (b) such determination will finally determine the entire cause or matter or any claim or issue therein. H
 - (2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just. I

A In *Korso Finance Establishment Anstalt v John Wedge* (unrep, 15 February 1994 CA Transcript No 14/387) the English Court of Appeal laid down the following principles:

- 1 An issue is a disputed point of fact or law relied on by way of claim or defence.
- B** 2 A question of construction is well capable of constituting an issue.
- 3 If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.
- C** 4 Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the mean in of the relevant document. If there were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence the court should not refrain from dealing with the application.
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(see The Supreme Court Practice 1999 Vol 1 para 14A/2/5).

. It should of course be noted that under O 14A r 1(2) of the RHC, the court has a wide discretion. It may upon determination of the question of law or construction dismiss the action or make such order or judgment as it thinks just. Thus, the action may be disposed of without a full trial and the judgment or order will have the same force and effect as the judgment or order after a full trial of the action. The defendants herein urged the court to adopt this procedure in the disposal of this case.

F O 33 r 2 of the RHC

In the alternative the defendants seek to rely on O 33 r 2 of the RHC, which provides as follows:

- (2) The court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

H Order 33 r (2) of the RHC came to be considered by our courts in a number of cases. One such cases is *Palaniappa Chettiar v Sithambaram Chettiar & Ors* [1982] 1 MLJ 186, where the FC held that (at pp 186–187):

The learned judge was correct in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents is upheld, this could conclude the whole proceedings and it would be unnecessary to try other issues.

I In *SI Rajah & Anor v Dato' Mak Hon Kam & Ors (No 1)* [1993] 3 MLJ 741, Lim Beng Choon J, allowed the application of the defendant for preliminary question to be determined by the court at the close of the plaintiff's case.

After considering a large number of authorities, the learned judge concluded that: A

- (1) Order 33 r 2 RHC 1980 has a very wide scope and is applicable to questions of fact or questions partly of fact and partly of law raised by a party to the suit 'before or at and after the trial' of the suit. However, before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations: B

- (a) As a general rule the court will exercise its power under O 33 r 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole.
- (b) An order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit. C
- (c) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so-called issues of fact, the justification is even harder to discern.
- (d) A preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue. D

In *MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 5)* [1998] 3 MLJ 226 Kamalanathan JC (as he then was) at p 228 sets out the principles applicable to an application under O 33 r 2 of the RHC in the following words: E

It is obvious that this application is made pursuant to O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). Having read the cases relating to this rule, namely *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, *Arab Malaysian Finance Bhd v Meridien International Credit Corp Ltd London* [1993] 3 MLJ 193, *Dominic J Puthucherry v Jet Age Construction Sdn Bhd & Anor* [1997] 2 MLJ 252, and the Supreme Court Practice 1997 and *Halsbury's Law of England* (4th Ed), the relevant principles by which an application under this rule is to be dealt with can be distilled. The following principles stand out, namely: F

- (1) This rule confers upon the court a discretionary power to order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, to be tried before, at or after the trial of the cause or matter. G
- (2) The said application may not be appropriate where facts are in dispute or extrinsic evidence is required to be adduced.
- (3) The application should not be dealt with on the basis of a hypothetical set of facts.
- (4) The overriding consideration is whether the application would result in a substantial saving of time and expenditure. H
- (5) The point of law should be raised on the pleadings.
- (6) That the court should warn itself against the abuse of this process.

Findings of the court I

Applying the above stated principles to the present case, the question is could the issues of both facts and law arising in this case appropriately be

A dealt with under O 14A and/or O 33 r 2 of the RHC. To answer this question, it is incumbent upon me to firstly consider the issues raised in the pleadings.

B The defendants in their applications identified a total of eight principle issues, the answer to which, they contend, would ultimately determine the outcome of this suit. The plaintiff in its reply contends that the proposed issues as formulated by the defendants fall to deal with all the issues raised by the plaintiff in the statement of claim. The plaintiff submits that the eight issues, as formulated by the defendants are very much oriented to the defence case. If the court were to decide the matter based on these issues alone it would naturally prejudice the plaintiff's case as it would not cover the dispute in its entirety. Upon scrutiny of the statement of claim it is apparent that the plaintiff is relying on six causes of actions as against the first defendant and six causes of action against the second defendant which are tabulated below:

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| | A | As against the first defendant |
| D | (i) | Breach of contract – paras 53 and 66 of the statement of claim. |
| | (ii) | Unfair discrimination – para 55 to 58. |
| | (iii) | Deprivation of property without compensation – paras 59–60. |
| | (iv) | Estoppel – para 61. |
| | (v) | Unlawful directional/ultra vires – paras 62–65. |
| | (vi) | Legitimate expectation – paras 6.1–6.4 of the reply. |
| E | B | As against the second defendant. |
| | (i) | Ultra vires – paras 67 of the statement of claim. |
| | (ii) | Relevant and irrelevant considerations – para 68. |
| | (iii) | Error of law – para 69. |
| | (iv) | <i>Wednesbury</i> unreasonableness – paras 70. |
| | (v) | Tort of inducing breach of contract – paras 72–77. |
| F | (vi) | 'Government contracts' – paras 78–81. |

I shall now deal with some of these issues. Firstly, on the question of the alleged breach of contract by the first defendant. The learned counsel for plaintiff submits that even on the question of the alleged breach of contract alone, the plaintiff is entitled to call extrinsic evidence to show the aim and genesis of the principal and supplementary agreements ('the two agreements'). In support, he cited the case of *Prenn v Simmonds* [1971] 3 All ER 237 where Lord Wilberforce at p 241 stated:

H In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of Dr Simmonds's intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

I The plaintiff further referred to the local case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, there Raja Azlan Shah CJ (Malaya) (as he then was) at p 283 stated with approval the view of Lord Wilberforce above, and said that the factual background to a contract is admissible in evidence as falling outside the scope of the prohibitory provision of our Evidence Act 1950.

A 1 MLJ 261 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Anor App* [1996] 1 MLJ 481. It follows that where a person's livelihood or reputation is adversely affected by a decision, then the decision maker must act fairly and reasonably.

B I agree with the plaintiff's contention that witnesses may need to be called to support the plaintiff's claim that the first defendant had unfairly discriminated against the plaintiff, and also to show how far reaching the effect of the defendant's action on the plaintiff. For those reasons, I am satisfied that the issues herein could not properly be resolved in the manner as prayed for by the defendants.

C Perhaps, I should emphasize that O 14A and O 33 of the RHC procedures should only be used in clear and simple cases. This proposition is supported by a long line of authorities. In this regard, I would firstly refer to the cautionary words of Lord Wilberforce in *Allen v Gulf Oil Ltd* [1981] AC 1001 (HL) at p 1010:

D My Lords, I and other of your Lordships have often protested against the procedure of bringing, except in clear and simple cases, points of law for preliminary decision. The procedure indeed exists and is sometimes useful. In other cases, and this is it frequently so where they reach the House, they do not serve the cause of justice. The present is such an example. The question as originally framed was clearly inept. It was recast by Kerr J into an improved form. But both judges in the court of Appeal found it either unintelligible or unanswerable: so I believe do some at least Your Lordships. The fact is that the result of the case must depend upon principles of law which are themselves flexible. There are too many variables to admit of a clear-cut solution in advance.

F Our Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, at p 480 expressed a similar sentiment:

At this juncture it is pertinent to quote – Sachs LJ in the case of *Radstock Co-operative & Industrial Society Ltd v Norton Radstock Urban District Council* [1968] Ch 605. At p 632 Sachs LJ says:

G 'In the category of cases which come before the courts in an unsatisfactory form the one now under consideration ranks high. Any preliminary issue which falls to be tried in the course of an action should always be one in which great care is taken to ensure that the issue presented for decision is well-defined and that the facts upon which it has to be considered are clearly ascertainable. In the present case there is not simply a single point for consideration but a whole series, and no such care was taken as regards any of them; moreover, when the pleadings came to be amended in the middle of the trial before the judge at first instance, the result was to make the matters less rather than more clear.'

I This is an apt quotation applicable in the present appeal. The issues in this case are riddled with complexities and the facts are in dispute so that to have recourse to O 33 r 2 [of the Rules of the High Court 1980], in our view, should not be had in the first place. In this respect, the observation of Lord Evershed MR in *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1961] Ch 373 at p 396 is appropriate to show that under certain circumstances O 33 r 2 is not the correct procedure to adopt:

‘... I repeat what I said at the beginning, that the course which this matter’ has taken emphasizes, as clearly as any case in my experience has emphasized the extreme un wisdom – save in very exceptional case – of adopting this procedure of preliminary issues. My experience has taught me (and this case emphasizes the teaching) that the shortest cut so attempted inevitably turns out to be the longest way round.’

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Lord Wilberforce in the often quoted judgment of *Tilling v Whiteman* [1982] AC 1 again expressed his strong reservation in adopting the procedure of allowing preliminary points to be taken. At p 17, he said:

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Pleadings were exchanged, and the case came on for trial in May 1977 with both sides legally represented. The learned judge took what has turned out to be an unfortunate course. Instead of finding the facts, which should have presented no difficulty and taken little time, he allowed a preliminary point of law to be taken, whether Case 10 applies to a case where there are joint owners one only of which requires the house in a residence. So the case has reached this House on hypothetical facts, the correctness of which remain to be tried. I, with others of your Lordships, have often protested against the practice of allowing preliminary points to be taken, since this course frequently adds to the difficulties of courts of appeal and tends to increase the cost and time of legal proceedings. If this practice cannot be confined to cases where the facts are complicated and the legal issue short and easily decided, cases outside this guiding principle should at least be exceptional.

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Having considered the pleadings and submissions of the parties, I find this is far from being a plain and simple case. It raises a number of complex legal issues involving, among others, the interpretation and construction of the Federal and State Constitutions, international conventions, the PDA and a number of other statutes. Further, the parties thus far failed to come to an agreement on the facts relevant to the issues before the court. For those reasons, I hold that this is not a fit and proper case to be proceeded with under O 14A or O 33 of the RHC. For the above reasons I am, therefore, constrained to dismiss the defendants’ application in encls (4) and (6) herein with costs. However, for completeness I should stress that this is not the end of the matter, as the court is yet to make its finding on the merits. Towards that end I direct that, barring any appeal against my decision, this case be forthwith sat down for pre trial case management pursuant to O 34 of the RHC.

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Defendants’ application dismissed with costs.

Reported by Zahid Taib

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